84-703

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1984

ALEX J. RAINERI,

Petitioner,

vs.

UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Alex J. Raineri
Pro Se.
502 6th Ave. N.
Hurley, Wisconsin 54534
(715-561-3873)

QUESTIONS PRESENTED

Petitioner was convicted of three counts of a violation of Title 18, U.S.C., Sec. 1952 and 2; one count of a violation of Title 18. U.S.C. Sec. 1623; and one count of a violation of Title 18, U.S.C. , Sec. 1503, the United States Court of Appeals affirmed those convictions with petitions for rehearing and hearing in banc denied.

Defendant then petitioned for vacation of judgment in the District Court for the Western District of Wisconsin under Title 28 U.S. C. 2255 and in the alternative a petition for a writ Coram Nobis which was denied. The United States court of Appeals for the Seventh Circuit affirmed the District Court and also denied Petition for Rehearing with a suggestion for rehearing in banc.

The issues presented in this court are:

1. Is the Travel Act Title 18 USC 1952 in such a state of conflict between the Federal Circuit Courts of Appeal that

justice is no longer equal to all citizens of the United States. One Appeals Court opinion states: "The Travel Act is in total disarray".

2. Does the Seventh Circuit Court of Appeals have the power to make novel rules of law interpreting the Travel Act contrary to a decision of the United States Supreme Court in finding that travel alone is sufficient to convict and when such travel is not related to an unlawful activity. Including when such travel is from the state which is the situs of the crime into another state where no unlawful activity takes place.

3. Is the Seventh Circuit Court of Appeals correct in ruling that a Title 28 USC 2255 motion cannot be used where the defendant has taken a direct appeal. That by taking direct appeal he has waived his right to raise new issues on a 2255 even if the motion is based upon fundamental defects of constitutional proportions. The reason for the rule is

because he has waived his right to do so in failing to bring the new 2255 issues on direct appeal. No finding of meaningful waiver was considered.

4. Is there equality of justice for Americans when the rule of law defining a party to a crime in the Sixth Circuit Court of Appeals says the defendant must have both intent and knowledge to aid the commission of a crime. In the Seventh Circuit the rule is that a party to a crime can be guilty without intent or knowledge or both. The same conflict exists among many Circuit Courts of Appeal.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Alex Raineri, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States court of Appeals for the Seventh Circuit entered in these proceedings on July 31, 1984, and further respectfully prays for a Writ Reviewing the Order Denying Petitioner's Petition for Rehearing with Suggestion for Rehearing in banc, which order was entered by the United States Court of Appeals for the Seventh Circuit on August 24, 1984.

OPINION BELOW

The opinion of the United States Court of Appeals affirming the District Court's denial of defendant's 2255 motion to vacate judgment of conviction and alternative coram nobis motion, is not reported and is attached hereto as Appendix A. Petitioner's Petition for Rehearing is attached hereto as Appendix B, and the Order Denying Petitioner's Petition for Rehearing is attached hereto as Appendix C.

JURISDICTION

The Petition for Rehearing with Suggestion for Rehearing in Banc was denied August 24, 1984. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254 (1).

STATUTORY PROVISIONS INVOLVED

18 U.S. C. 1952;

(a) Whoever travels in interstate...commerce or uses any facility in interstate commerce, including the mail, with intent to.....

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion of any unlawful activity,

" and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than ($10,000) or imprisoned for not more than five years or both.

(b) As used in this section 'unlawful activity' means (1) any business enterprise involving prostitution offenses in violation of the laws of the state in which they are committed.....

STATEMENT OF THE CASE

Petitioner was convicted of five felonies after a trial by jury in the Western District of Wisconsin, with the Court sitting in Madison, Wisconsin.

Petitioner's convictions were affirmed by the United States Court of Appeals for the Seventh Circuit, and the United States Court of Appeals for the Seventh Circuit denied Petitioner's Petition for Rehearing in Banc. Certiorari was denied by the Supreme Court of the United States on Appeal.

Petitioner then filed a motion to vacate judgment to the District Court for the Western District of Wisconsin under 28 U.S.C. §2255 and in the alternative a motion Coram Nobis, which motions were denied.

The Court of Appeals for the Seventh Circuit affirmed the District Court on appeal and denied petitioner's Petition for Rehearing with Suggestion for Rehearing in Banc.

STATEMENT OF FACTS

The indictment as to five counts fails to state facts sufficient to constitue probable cause that 18 USC 1952, and 2, 1623 and 1503 were violated.

The indictment in counts 1 and 2 charge that the defendant, party to a crime, caused travel of a check from Wisconsin to the State of Michigan. The checks in each count were drawn on a Michigan bank, delivered to the payees in Wisconsin, cashed in Wisconsin and cleared in Michigan at the drawee bank.

The defendant had no connection with the checks or the bank except for the statement of a handwriting expert that the writing on the payee portion of the check could be that of the defendant. In count 1. at trial the payee a government witness, testified that the writing on the payee portion was her own and not the defendant's. Defendant concededly had no connection with the check in count 1.

Count 1 was a check payable to a dancer who was also a prostitute. She received the

check as salary payment for exotic dancing in Wisconsin, cashed the check in Wisconsin at a grocery store. The grocer took the check to the payee bank in Michigan for deposit to his account.

Count 2 was a corporation check unrelated to the defendant in any way, other than the handwriting concluded to be his on the payee portion by a handwriting expert. The check was payable to a Wisconsin Utility, paid to it in Wisconsin and deposited by it in a Wisconsin bank. Thereafter it went to a clearing house and back to the drawee bank in Michigan.

Nothing in the indictment alleges that the checks are in any way connected to any crime.

Count 3 charged that a linen service in Minnesota delivered to a corporation in Wisconsin mainly bar towels and a small amount of bed linen. Since prostitution existed at times at the tavern operated by the corporation the indictment infers, but does not say that the delivered linen was used for prostitution. In fact the government proved by its

own witnesses that any linen used in the business building was purchased from local stores. How the interstate linen service facilitated an unlawful activity is a blank.

Count 4 alleges that because the defendant travelled from Wisconsin to Nevada for reasons totally unrelated to any unlawful activity in either state that the trip was material to a Grand Jury investigation. In its proof the Government showed that the travel was with a person who no longer was in charge of any business activity in Wisconsin. Again the indictment charges a trip unrelated to any violation of the travel act was material to a Grand Jury investigating Wisconsin unlawful activity relating to travel act violations.

Count 5 states that the defendant arranged for a prospective witness before a Grand Jury to be threatened. It fails to state that defendant knew the person threatened was a prospective witness. Nor does it state how defendant arranged the threat. There are only bare conclusions and no factual statement of probable cause.

The appeals court decision reasons that an attack on the sufficiency of the complaint is nothing more than an attack on sufficiency of evidence. That they are one and the same.

The appeals court decision also reasons that notwithstanding the defendants showing in a 2255 motion that there were fundamental defects in the instructions at trial which were not raised on direct appeal, these defects were waived absent a showing of cause and prejudice. That a failure by defendant in his motion to show why he did not raise on direct appeal the fundamental defects of constitutional proportion, he thereby waived them regardless of the injustice done.

REASONS FOR GRANTING THE WRIT

A learned jurist U.S. vs. Jones cited in the table of authorities said " CASE LAW DEFINING THE REQUISITE 'THEREAFTER ACTS' IS IN DISARRAY". That statement is not only true in so far as the thereafter acts but includes "INTENT OF DEFENDANT"

" KNOWLEDGE OF TRAVEL","KNOWLEDGE OF CRIME" "DIRECTION OF TRAVEL", "RELATION OF TRAVEL TO CRIME", "ELEMENTS RELATING TO PARTY TO CRIME", ELEMENTS RELATING TO PRINCIPAL AND CONSPIRITORS", "LOCATION OF CRIMINAL ACT" "APPLICATION OF LENITY", "TRAVEL ALONE NOT SUFFICIENT TO CONVICT".

The diversity of reasoning in the appellate court has wrought absurd results. For example, in the 7th circuit convictions do not require a defendant to knowingly cause or reasonably foresee interstate travel or use of an interstate facility-U.S. vs. McPartlin 595 F 2d 1321. A conspiracy case. In the 6th circuit a defendant must have knowledge of interstate activity see case cited U.S. vs. Alsobrook, 620 F 2d 139. These circuits adjoin each other and in this case the travel charged is from Wisconsin in the 7th circuit and Michigan in the 6th circuit. So that this defendant could have been tried in the 7th circuit and convicted and in the 6th circuit and found innocent.

In the 5th circuit the Jones case cited above travel need not be from one state to another where a crime must occur. Yet in U.S. vs. Zemater a 7th circuit case cited in the table in order to be convicted travel must be from the state of origin to the state of destination where the crime must occur. In the 5th circuit a defendant would be guilty while in the 7th circuit the same defendant for the same activity would be innocent.

In most circuits the travel must be connected to the crime and make it easier to commit, yet in the 7th circuit under the conspiricy McPartlin rule it is sufficient to infer that the defendant would have if he could do something in the future to aid in the criminal activity whether he had done so or not, when the interstate travel took place.

In most circuits a party to a crime instruction requires the aider to have intent to aid the principal and in addition have a skill of some kind contributing to the principal's greater chance of success in the criminal activity.

In most circuits a party to a crime must have knowledge of the crime. In the 7th circuit knowledge is not an element of the crime of aiding and abetting.

In the present case under the McPartlin case rule a co-conspiritor who is a principal is equal to an aider and abetter whose involvement is different.

In all of the jurisdictions violation of the travel act requires travel to be into the state where the unlawful activity takes place. That is the state of destination. The travel act itself states that travel or use of an interstate facility must take place first and thereafter the unlawful activity must take place or be made easier to do by means of the use of interstate activity.

In the present case the indictment places the situs of the unlawful activity as in Wisconsin and travel is then to Michigan and Minnesota where no unlawful activity occurs. In fact the travel interstate does nothing to enhance the unlawful activity in the state of origin.

The Supreme Court in Rewis vs. U.S. cited in the tables states that travel alone is not enough to violate the Travel act. It says too that lenity should be used in applying the act. It further said that the courts should not reach absurd results. Under the indictment in the present case the charge is that the defendant cause checks in counts 1 and 2 to move from the situs of the unlawful activity into a state where nothing happened. The indictment charges that thereafter the defendant did cause acts to be performed that promoted and facilitated the carrying on of said (Wisconsin) illegal activity. The indictment does not specify how this occurred. The indictment is silent how the causing of a check to travel from Wisconsin to Michigan facilitated an unlawful activity that apparently existed and performing without the checks in counts 1 and 2.

In count 3 the most that can be said is again that linen travelled interstate. Its purpose is charged to be promotion and facilitation of unlawful activity. The "how" is missing and in the proofs this particular linen

was never used in any unlawful activity.

FURTHER REASONS FOR GRANTING THE WRIT

The defendant raised the issue of sufficiency of the indictment. The indictment fails to state facts containing the elements of the violation of the Travel Act. Thus it fails to provide probable cause by facts, that a violation occurred. The Court of Appeals for the Seventh Circuit holds that such a defense is merely an issue of sufficiency of evidence. Sufficiency of evidence merely states that the indictment being a legal and proper charge is not supported by the proofs. An insufficient indictment affects the jurisdiction of the court, because there is no legal and proper charge.

The same Court of Appeals said that even though fundamental defects in the trial that were of constitutional proportions, such defects were waived by the defendant if he fail- to raise those issues on direct appeal.

The appellate court did not find that the defendant deliberately or meaningfully bypassed or waived his appellate remedy as required by Morris vs. U.S.

Nor did the appellate court follow the rule in Brown vs. U.S. that the merits of an issue must be considered on motion to vacate sentence even if such issues could have been raised on appeal. The purpose of a 2255 motion is to prevent the miscarriage of justice. This appellate court has adopted a new and novel rule that the 2255 motion can no longer be used as a post conviction remedy. Not even in cases where the conviction is illegal.

FUNDAMENTAL DEFECTS

The instructions contain fundamental defects that denied defendant a fair trial.

One instruction relating to party to a crime stated that the defendant had to be found to know of the crime involved and to have the intent to aid the commission of it.

Another instruction on conspiricy told

the jury that it did not have to find that the defendant as party to a crime had to know of the crime or have any intent to commit the same. Defendant is not charged with conspiricy. The jury was instructed that defendant did not have to know of anything relating to the crime to be found guilty.

The trial Court also ruled that it was immaterial that the defendant did not know the person to be coerced was a prospective witness. The jury instruction then omitted that knowledge of prospective witness by the defendant from its instructions to the jury.

CONCLUSION

The indictment charged that two checks travelled interstate with no thereafter crime in the state of destination. The laundry travelled from Wisconsin to Minnesota to be laundered, but with no unlawful activi- in Minnesota. With the indictment failing to state facts that support a finding of probable cause that a crime was committed and that the defendant aided in the commission of it.

That the court review the trial court's instructions containing fundamental defects as set forth in exhibits of this brief.

Petitioner respectfully asks that this Court review the decision of the Seventh Circuit Court of Appeals and the several Courts of Appeal with regard to the many different interpretations of the Travel Act, 18 USC 1952. These differences have created an injustice to American Citizens. These differences are deviations from the rules interpreting the Travel Act in the Case of Rewis vs. U.S. cited in the table of authorities.

That this court review the Seventh Circuit Court of Appeals finding that the issue of sufficiency of an indictment is the same as an issue of insufficient evidence.

That this Court review the findings of the Seventh Circuit Court of Appeals wherein it has reasoned that nothwithstanding the existence of fundamental defects in the trial court instructions that are of constitutional proportions resulting in the conviction of this defendant, these defects are waived by failure to raise them by direct appeal. With

no finding of a wilful or meaningful waiver by the defendant.

The existing disarray in the interpretations of what violates the Travel Act is causing absurd results. In the Seventh Circuit a person can be in violation of the Travel Act if he drives from one State into another State with one headlight burning on his automobile. Or if a person travels from one State into another State and violates a traffic ordinance the mere travel across State lines would make him guilty. This being so because the rule in the Seventh Circuit now is that a person need only travel and do an unlawful act without having the intent to do so at the time of interstate travel or the knowledge that he did do an unlawful act under state law.

If the interpretation of the Travel Act by the Supreme Court in the Rewis vs U.S. is still the law of the land where travel alone is insufficient to violate 18 USC 1952 and if lenity is to be ap-

plied to the facts, then that should be the rule in all of the Circuits.

If the same instruction of law as to a conspiritor and a party to a crime then there should only be one instruction for both.

If it is to be the law that post conviction motions under 2255 are to be repealed because everything must be raised on direct appeal lets have it clearly spelled out. Present law seems to say that motions under 2255 that attack a valid judgment of conviction are not valid. The same case law seems to hold that 2255 motions attacking convictions based upon fundamental defects in trial that are of constitutional proportion and have not been raised on direct appeal are proper.

Where an indictment fails to state factual probable cause that a violation of a particular statute occurred how can there be a resulting conviction with justice?

Where an indictment is bases solely on conclusions and statutory language without the "what", "how" in a complete statement of factual probable cause, where does jurisdiction attach?

Unless justice in America is going to be that a person become a target for indictment, conviction by a jury, and the conviction to be upheld irrespective of fundamental defects in the conviction, as it is now in the several Appeals Circuits, should not the Supreme Court speak out to correct injustice. Supreme Court case law should remain binding on everyone until changed or reversed by the Supreme Court.

The only way interpretations of Statutes can reach such proportions of disarray as is the Travel Act is by a total disregard of the rules of law laid down by the Supreme Court in its decisions on that Statute.

In the McPartlin case 595 F 2d 1321 the interpretation of the travel act differs with U.S. vs. Alsobrook 620 F 2d 139. McPartlin a conspiricy case involving co-conspiritors holds that the Travel Act does not require that the defendant knowing cause or reasonably foresee interstate travel or the use of an interstate facility. Alsobrook a 6th Circuit case alluding to a party to a crime case holds that a defendant must have actual knowledge of the interstate activity.

The party to a crime instruction requires knowledge and intent as to the crime and the travel and is so used in most Circuits. The McPartlin rule is applied to co-conspiritors because the instructions on conspiricy hold that once a conspiritor enters into the conspiricy he remains responsible for all acts that follow knowing what followed or not knowing makes no difference. The positions of party to a crime and co-conspiritor differ greatly.

In giving instructions on false material declarations before a Grand Jury it is for the court to determine whether or not the declarations were material to the investigation. It is for the jury to determine if the declarations were false. Another element required in the giving of false declarations to a Grand Jury is, did the false declarations tend to impede the Grand Jury's investigation of the particular matter. No instruction including that element was given to the jury and no such finding was made by the court that there was an impediment.
In this case the defendant admitted to the Grand Jury that he knew the owner of the Showbar for 20 years and that he was her attorney during that time. He also stated that he and his wife socialized with the owner of the showbar and her husband during those 20 years and that they were as close socially as siblings. The travel to Reno declarations were nothing more than minor duplication of prior admissions.

In giving the instruction on Count V coercing a witness the Court failed to state the words that the Government must prove the elements of the crime "beyond a reasonable doubt".

The instruction also omit a material element of the crime and that is "that the defendant knew at the time that the person being coerced by him was a prospective witness in a legal proceedings". That is a fundamental defect affecting due process and fair trial.

Defendant on trial requested an instruction from the Court relating to proof by the Government that the defendant knew of the use of an interstate facility since he was not a principal, but only a party to the crime. That was denied by the Court.

Dated October 17, 1984.

Respectfully

Submitted.

Pro Se. Alex J. Raineri
502 6th Ave. N., Hurley, Wisconsin

APPENDIX A

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit

(Submitted July 24, 1984)*

July 31, 1984

BEFORE

Hon. Walter J. Cummings, Chief Judge

Hon William J. Bauer, Circuit Judge

Hon. Joel M. Flaum, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

No. 83-3167

ALEX RAINERI,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Wisconsin.

No. 80 CR 29

Barbara B. Crabb

Judge.

ORDER

The appellant appeals the order of the district court denying his petition for vacation of judgment made pursuant to 28 USC § 2255. The appellant raised seven grounds attacking his conviction: 1. ineffective assistance of counsel; 2. conflicting and misleading jury instructions; 3. erroneous findings of fact made by the district court; 4. admission of witnesses testi-

mony concerning business records which were never produced; 5. denial of an effective right to confront a witness resulting from the district court's ruling that certain medical records were priviledged; 6. error in allowing the government to proceed on two theories of liability; and 7. selective prosecution. The district court held that the appellant had raised the inefective assistance of counsel and erroneous fact findings claims on direct appeal and that review of those claims under § 2255 was therefore precluded. The court held that the remaining claims did not rise to the level required for relief under §2255.

On appeal the appellant has reorganized his allegations to state three claims: 1. That there was a fatal variance between the indictment and the proofs; 2. denial of effective assistance of counsel; and 3. fundamental errors in instructions. The appellant insists that none of these claims were raised on direct appeal.

After examining the record and the apellants brief, we conclude that the appellant's first argument is nothing more than an attack on the sufficiency of evidence, an argument which was considered and rejected on the appellant's direct appeal. United States v. Raineri, 670 F 2d 702, 715-19 (7th Cir. 1982). Further, contrary to the appellant's assertion this court also considered and rejected the appellant's assistance of counsel claim Id. at 711-12.

Finally, to the extent that the appellant is correct that his claims were not raised on direct appeal, such claims are waived absent a showing of cause and prejudice. Norris v. United States 687 F. 2d 899, 903-4 (7th Cir. 1982). Because the appellant has failed to show cause for his waiver, we need not consider these issues. The order of the district court is therefore AFFIRMED.

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee

No. 83-3167 vs

ALEX RAINERI,

Defendant-Appellant

No. 80 CR - 29

Appeal from the United States District Court for the Western District of Wisconsin

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PETITION FOR REHEARING

WITH SUGGESTION FOR REHEARING IN BANC

Alex Raineri
Defendant pro se
502 6th Ave. N.
Hurley, Wisconsin
54534

SUGGESTION FOR REHEARING IN BANC

Petitioner respectfully suggests this petition be heard in banc. The basis for the suggestion is as follows:

I realize that this case labors under the curse of a public official, in this case a Circuit Judge, running a-foul of the law betraying a public trust of his office. Such is not the case. The United States Parole Board made findings that "subjects (defendant) criminal activity had no direct involvement with his position as judge. Subject apparently allowed himself to operate on the fringe of the law and even outside the law in certain matters".

So if the court's decision is allowed to stand you will be setting a precedent allowing a person to stand convicted although what he did was not contrary to the Federal statute charged, Title 18 USC 1952, known as the Travel Act. This precedent will be a yoke around the neck of every American Citizen no matter what station

in life he lives.

It is clear that every statutory crime has elements created by its language. The Travel Act is clearly stated that "whoever travels or uses any interstate facility, with intent to carry on any unlawful activity and thereafter performs or attempts to perform any of the acts above mentioned (criminal activity)" violates the statute.

In this case the charge in the indictment did not comply with the statutory requirements concerning the sequence of interstate travel and subsequent violation of state law.

It is clearly stated in the indictment that the travel was from Wisconsin in each Counts I and II over to Michigan where the thereafter criminal activity must commence. In count III the travel was from Wisconsin to Minnesota where the thereafter criminal activity should have commenced. There were no crimes or criminal activity in Michigan

or Minnesota and none is alleged to have taken place in those states. Nor was there any proof offered on trial of any criminal activity in those states. So again, if there is no crime factually stated in the indictment or proven at trial that complies with the Travel Act as defined, how can there be a conviction of a crime against that law.

If this court is going to re-define the Travel Act then it is legislating purely and simply. Then you are going to have to convict every person who travels interstate or used an interstate facility and is doing an illegal act, related or not to the travel.

Now, as to the courts holding as to waiver of constitutional rights as relates to fundamental defects in the instructions which are constitutional violations. If your rulings are to stand then you have permitted a defendant to waive his constitutional rights regardless of the fact that

such waiver was not made in a meaningful and understanding manner. So following this decision a defendant who has not deliberately by passed appellate remedy will lose his right to a 2255 remedy by unintended waiver.

PETITION FOR REHEARING

A. No offense charged in the indictment or proven at trial in compliance with Title 18 USC 1952 destroying jurisdiction to convict.

The courts decision states that the above is merely a question of sufficiency of evidence. Given all of the evidence and given the indictment in full coupled with the statute no violation of the Travel Act, 1952 exists. The indictment says that there was travel from Wisconsin to Michigan and from Wisconsin to Minnesota and there after the carrying on of criminal activity. It does not state where the unlawful activity took place. In order to satisfy the Travel Act the unlawful activity must of necessity occur in the state of destination, Michigan or Minnesota. No such claim is made or even suggested either in the indictment or the proofs at trial.

United States vs Zemater 501 F 2d 540 (7th Circ) states:

"In all events, however, appellants conviction cannot stand. The difficulty is not, as in U.S. vs. Altobella, 442 F 2d310 (7th Circ, 1971) and U.S. vs. McCormick 442 F 2d 316 (7th Circ 1971) that the use of interstate facilities was only incidental to the violation of state law. Neither is it that the general scheme in which the jury believed the appellants to have been involved was outside the ambit of congressional concern when the Travel Act was enacted. The problem is that the charge in the indictment did not comply with statutory requirements concerning the sequence of interstate travel and the violation of State Law, and, therefore, charged no offense". (7th Circ. 1974)

In the case at hand the charge is that the defendant caused travel from Wisconsin to Michigan in Counts I and II and from Wisconsin to Minnesota in

count III and thereafter violated said un lawful activity.

The unlawful activity alleged already existed in Wisconsin according to the complaint on a given date prior to the use of an interstate facility and therefor could not be as the travel act requires, that one travel first and THEREAFTER perform the unlawful activity.

This rule of law as to travel is confirmed by Rewis vs U.S. 401 U.S. 808 saying that there must be travel from one state into another state where the unlawful activity is then committed. Or that the use of an interstate facility to encourage the travel from another state must accompany the travel to convict for engaging in an unlawful activity. That, travel alone is not enough to violate the statute. That there must be a scheme to travel from one state to another for the purpose of easing the unlawful activity in the state of destination. It also says lenity should be the rule use by the courts in judging

the facts.

B. Issue of sufficiency of evidence.

The issue of there being sufficient evidence in the record of a substantial or competent nature is not raised in the 2255 motion and is not raised here now. Sufficiency of evidence is raised when there is a legal and proper charge of a statutory violation. Defendant claims that no proper and legal charge exists and the issue being challenged is one of jurisdiction.

C. Claim of fundamental defects in the instructions are constitutional in scope.

The decision did not find that this defendant deliberately bypassed his appellate remedy. Morris vs U.S. 503 F 2d 457 states that constitutional claims raised on post conviction motions are only foreclosed when it appears that petitioner has deliberately bypassed appellate remedy. Brown vs U.S. 468 F 2d 897 states that the merits of an issue must be considered

on motion to vacate sentence even if such issues could have been raised on appeal.

The purpose of 2255 is to prevent the miscarriage of justice. Assuming that there are fundamental defects in the instructions such as failure to include an element of a crime called for in the statute and another instruction giving the jury a choice of finding that the defendant was a party to a crime or a conspiritor each calling for opposite definitions, how can the defendant have due process and a fair trial?

U.S. vs. Lewis 392 F 2d 440 states that the underlying purpose of a 2255 motion is to remove the possibility of survival of injustice beyond trial and appeal.

Has the 7th circuit adopted the waiver rule to preclude the correction of injustice? I trusted my attorney to use every means possible to see that justice was done. I did not learn of his failure until long after he used up all of my remedies.

Respectfully Submitted

Alex Raineri, pro se
502 6th Ave. N.
Hurley, Wis. 54534

APPENDIX C

UNITED STATES COURT OR APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

August 24, 1984

BEFORE

Hon. Walter J. Cummings, Circuit Judge

Hon. William J. Bauer, Circuit Judge

Hon. Joel M. Flaum, Circuit Judge

United States of America,
Plaintiff-Appellee,

vs.

No. 83-3167

Alex Raineri,
Defendant-Appellant.

Appeal From the United States District Court for the Western District of Wisconsin.

No. 80 CR 29

Barbara Crabb
Judge

ORDER

On consideration of the petition for rehearing filed in the above entitled cause by Defendant-Appellant, all of the judges on the original panel having voted to deny the same,

It is hereby ordered that the aforesaid petition for rehearing be and the same is hereby denied.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

United States of America

vs.

Alex J. Raineri,

Defendant.

INDICTMENT

No. 80 CR 29

18 USC §1952 & 2
18 USC §1623
18 USC §1503

The Grand Jury Charges:

Count I

On or about August 23, 1978, in the Western District of Wisconsin,

ALEX J. RAINERI

the defendant, with intent to promote and facilitate the carrying on of a business enterprise involving prostitution in violation of Sections 944.30 and 944.34 of the Wisconsin Statutes, an unlawful activity, in connection with Ritz Bar, Inc., doing business as the Showbar, Hurley, Wisconsin, did cause travel and the use of a facility in interstate commerce between the Western District of Wisconsin and Ironwood, Michigan in that he cause a Ritz Bar , Inc., payroll check, written

in Hurley, Wisconsin, drawn on the First National Bank of Ironwood, Ironwood, Michigan, payable to Yvonne Spears, a prostitute employed by Ritz Bar, Inc., doing business as the Show Bar, Hurley, Wisconsin, to be taken to the drawee bank in Ironwood, Michigan, and thereafter Alex J. Raineri, the defendant did perform and cause to perform acts to promote and facilitate the carrying on of said unlawful activity.

(In violation of Title 18, USC, Sec 1952 and 2.)

COUNT II

On or about September 19, 1978, in the Western District of Wisconsin,

ALEX J. RAINERI

the defendant, with intent to promote and facilitate the carrying on of a business enterprise involving prostitution in violation of Sections 944.30 and 944.34 of the Wisconsin Statutes, an unlawful activity, in connection with Ritz Bar, Inc.,doing business as the Show Bar, Hurley, Wisconsin, did cause the use of a facility in inter-

state commerce between the Western District of Wisconsin and Ironwood, Michigan, in that he caused a Ritz Bar, Inc., check written in Hurley, Wisconsin, drawn on the First National Bank of Ironwood, Ironwood, Michigan, payable to the Lake Superior District Power Company, for the purpose of paying for electrical power provided by the Lake Superior District Power Company to Ritz Bar, Inc, doing business as the Show Bar, Hurley, Wisconsin, to be taken to the drawee bank in Ironwood, Michigan, and thereafter Alex J. Raineri, the defendant, did perform and caused to be performed acts to promote and facilitate the carrying on of said unlawful activity.
(In violation of Title 18, USC, Sec 1952 and 2)

COUNT III

On or about September 29, 1978, in the Western District of Wisconsin,

Alex J. Raineri

the defendant, did cause to be used a facility in interstate commerce between Hibbing, Minnesota and Hurley, Wisconsin, to wit: the delivery and pick up facilities of Ameri-

can linen supply company, with intent to promote and facilitate the carrying on of a business enterprise involving prostitution in violation of Sections 944.30 and 944.34 of the Wisconsin Statutes, an unlawful activity, in connection with the Ritz Bar, Inc., doing business as the Show Bar, Hurley, Wisconsin, and thereafter Alex J. Raineri, the defendant, did performa and cause to be performed acts to promote and facilitate the carrying on of said unlawful activity.
(In violation of Title 18, USC, Sec. 1952 & 2)

COUNT IV

1. On March 18, 1980, in the Western District of Wisconsin,

Alex J. Raineri

the defendant, having taken oath that he would testify truthfully and while testifying before a Grand Jury in the Western District of Wisconsin, a Grand Jury duly impaneled and sworn in the Western District of Wisconsin on

August 28, 1979, did knowingly make false material declarations as hereinafter set forth.

2. At the timeand place alleged, the Grand Jury was conducting an investigation into possible violations of Title 18, USC § 1952, and other Federal Laws in connection with prostitution activities and those involved with such activities centering around the Show Bar in Hurley, Wisconsin, during the period including 1977 to 1979.

3. It was material to said investigation to ascertain what connection , if any, existed between Alex J. Raineri, the defendant, a Circuit Judge for Iron County, from January 1, 1978, to date and previously District Attorney for Iron County, and Cira Gasbari, the person in overall charge of the Show Bar situated in Hurley, Iron County, Wisconsin. In pursuaing this question, it was materail to ascertain whether the defendant, Alex J. Raineri in attending a judicial function in Reno, Nevada in September and October, 1978 travelled with and was

accompanied by Cira Gasbarri.

4. On March 18, 1980, in the Western District of Wisconsin, Alex J. Raineri, the defendant, appearing as a witness under oath at a proceeding before the Grand Jury did knowingly make the following declarations in response to the following questions relating to the material matter alleged in paragraph 3.

Q Do you remember making a trip to Nevada in the rall of 1978?

A. Yeah.

Q Where did you go then?

A. Judicial college, went to Reno.

Q Did you go with her (Cira Gasbarri then?

A No. She was there. She came with her family, with her brother and sister. And they were on a hunting trip and she came to Reno. I met her there; they looked me up there.

Q And you didn't travel with her from Hurley to Reno?

A. (Shaking head negatively)

Q You went from Hurley to Reno alone?

A (Nodding head affirmatively)

Q You're going to have to answer yes or no.

A Yes

Q And you met her in Reno with her family?

A I met her in Reno with her family, right.

Q What members of her family came along.

A She had a brother and a sister. The Sister's name was Tatto, and I forget, I don't know the brother's name. I can't think of it.

Q And she came from California?

A Right

Q Do you know when she had left for California from Hurley.

A I am not sure.

Q Well,had you left Hurley to go to the--- Was it a Judicial Seminar?

A I went to a Judicial seminar, yeah.

Q Do you know whether she was still back in Hurley?

A I don't know. I think she could have been.

Q. So you don't know whether she left

Hurley for California before or after you left for Reno?

A I don't know.

Q And was it planned that you would meet her in Reno?

A Not ahead of time, no. But I toldher I was going there.

Q And what happened; she called you up and said she was coming by with her family.

A No, I ran into her sister. I was sitting in one of the Casinos. Because I get up early in the morning, I was in the casino and I ran into her sister just by accident. It was almost like the most unusual thing. And then she told me who was with her and then she came down and I met Cira.

Q And how much time did you spend with Cira?

A Oh, I think I spent, just like usual I spent probably the day with her until they went back.

Q And were you always with her brother and sister at the time?

A No, no. I went and had a drink with her too.

Q And then she went back to California?

A Then she went back to California with them?

Q You didn't fly back to Hurley with her?

A Not with her.

Q you came back alone?

A (nodding head affirmatively)

Q Is that--

A Yeah, I came back alone.

5. The declarations quoted in paragraph 4 made by Alex J. Raineri, the defendant, were material to the investigation and as he knew were false.

(In violation of Title 18 USC Sec. 1623)

COUNT V

On or about March 19, 1980, in Hurley, Wisconsin in the Western District of Wisconsin.

Alex J. Raineri

the defendant, by threat and threatening com-

munuication, endeavored to influence, obstruct and impede the due administration of justice in that he arranged for Patricia Colosacco, a prostpective witness in a then pending Grand Jury investigation in the Western Dis - trict of Wisconsin, to be threatened in connection with her prospective testimony.
(In violation of Title 18, United States Code Section 1503)

A True Bill

/s/ Gerald E. Roewer
Foreman

/s/ Frank M. Tuerkheimer
Frank M Tuerkheimer, United States Attorney
Indictment returned June 6, 1980

APPENDIX E

INSTRUCTIONS GIVEN BY THE COURT AS TAKEN FROM THE TRANSCRIPT OF THE TRIAL

Page 1,004, 1005

"Counts I, II, and III. The elements. In order for you to find the defendant guilty on any of these three charges, you must find with respect to the charge that the Government has proven each of four elements beyond a reasonable doubt. Those four elements are as follows:

1. That someone travelled in interstate commerce or used an inter state facility in furtherance of a business enterprise involving prostitution;
2. That the person who caused the travel or use did so with intent to promote, facilitate or carry on a business enterprise involving prostitution
3. That a participant in the enterprise thereafter performed or caused to be performed acts to promote, facilitate or carry on the unlawful

activity, and;

4. That the defendant, Alex J. Raineri, was a knowing and wilful participant in the unlawful activity at the time of the interstate travel or use of the interstate facility and at the time the subsequent act or acts took place.

Page 1000 Transcript.

"Whoever aids, abets, counsels, commands, induces or procures the commission of a crime is punishable as a principal. In order to aid or abet the commission of a crime a person must associate him self with the criminal venture, participate in it and try to make it succeed".

"Counts I, II and III of the indictment are brought under Section 1952 and Section 2 of the Federal Criminal Code. In pertinant part Section 1952 makes it a crime for anyone to travel in interstate commerce or use any facility in interstate commerce with intent to promote , facilitate or carry on any unlawful activity and thereafter promotes, facili-

tates or carries on an unlawful activity.

Page 1005 Transcript.

" To be found guilty under section 1952, a a defendant need not know or reasonably foresee that the facilities of interstate commerce will be used or that someone will travel in interstate commerce since the use of interstate facilities or interstate travel merely provides the basis for Federal jurisdiction. It suffices if someone, even a person lacking any involvment in the unlawful activity, traveled in interstate commerce or used an interstate facility in a way which furthers the unlawful activity".

" The second element that the Government must prove is that a person caused the interstate travel or the use of interstate facilities with intent to promote, facilitate or carry on unlawful activity, in this case a business enterprise involving prostitution".

Page 1006 and 1007 of the transcript.

" The third element requires the Government to prove that after the interstate travel or after the interstate facility was used with the intent by a person involved in the unlawful activity, that a participant performed or caused to be performed acts designed to promote, facilitate or carry on the unlawful activity. This means that for a violation of Section 1952 to occur, first there must be the occurrance of the interstate activity under circumstances evincing the intent I've described; second, there must be acts afterward to promote, facilitate or carry on the unlawful activity".

"Finally, the Government must show that the defendant, Alex J. Raineri, was a knowing and wilful participant in the unlawful activity at the time of the interstate travel or use of an interstate facility and at the time that the subsequent act or acts took place".

Instructions on Perjury page 1013 Transcript.

" In order for you to find the defendant guilty on count IV, you must find that the government has proved each of the three elements beyond a reasonable doubt. The three elements are as follows:

1. That Alex J. Raineri testified under oath before a United States Grand Jury as charged in Count IV.
2. That while so testifying Alex J. Raineri made one or more material false declarations charged in Count IV.
3. That in making of such false declaration or declarations Alex J. Raineri acted knowingly.

Instructions on coercing witness page 1015.

Now in order for you to find the defendant guilty on Count V, you must find that the Government has proven each of three elements; The three elements are as follows:

1. That Alex J. Raineri eneavored to influence, obstruct or impede the due administration of justice.
2. That this endeavor was by means of threat or threatening communication directed at a prospective Grand Jury Witness;
3. That Alex J. Raineri acted knowingly. The word knowingly as used in the crime charged, means that the act was done voluntarily and purposely and not by mistake or accident.

No. 84-703

In the Supreme Court of the United States

OCTOBER TERM, 1984

ALEX J. RAINERI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
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QUESTION PRESENTED

Whether the court of appeals correctly declined to consider petitioner's claims of error raised in a motion filed under 28 U.S.C. 2255 upon concluding that some of those claims had been raised and rejected in petitioner's direct appeal from his conviction and that petitioner had waived the others by not raising them on direct appeal and failing to make the necessary showing of cause and prejudice to excuse the waiver.

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No. 84-703

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) affirming the denial of petitioner's motion under 28 U.S.C. 2255 is unreported. The opinion of the court of appeals affirming petitioner's conviction on direct appeal is reported at 670 F.2d 702.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1984. A petition for rehearing was denied on August 24, 1984 (Pet. App. C). The petition for a writ of certiorari was filed on November 2, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Wisconsin, petitioner was convicted on all counts of an indictment charging that he had

caused travel or the use of a facility in interstate commerce to promote a business enterprise involving illegal prostitution, in violation of 18 U.S.C. 1952 and 2 (Counts I through III); that he had knowingly made false and material declarations before a federal grand jury, in violation of 18 U.S.C. 1623 (Count IV); and that he had attempted to obstruct justice by arranging to have a prospective grand jury witness threatened in connection with her prospective testimony, in violation of 18 U.S.C. 1503 (Count V). Petitioner was sentenced to consecutive terms of imprisonment of one and two years on Counts IV and V, respectively. He also was fined $5,000 on each of Counts I through III.

1. The evidence showed that in 1976, at petitioner's request, Cira Gasbarri returned from California to Hurley, Wisconsin, to reopen the Showbar, which her husband had operated as a prostitution enterprise before his death in November 1975. From late 1976 until early 1979, petitioner managed the Showbar with Gasbarri. Petitioner paid Gasbarri $50 for every night she worked at the Showbar and, at his urging, she permitted prostitution in the Showbar. *United States* v. *Raineri*, 670 F.2d 702, 716 (7th Cir.), cert. denied, 459 U.S. 1035 (1982).

During the period that petitioner managed the Showbar, he also promoted prostitution there.[1] Dancers employed by the bar would go to booths in the bar and masturbate customers who had paid $35 or $50 for a $3 bottle of champagne.[2] During the same period, the dancer/prostitutes made arrangements in the bar for the sale of sexual

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[1]According to the court of appeals, petitioner "virtually concede[d] the sufficiency of the evidence which demonstrated his intent to promote prostitution at the Showbar and his promotion of prostitution there." *United States* v. *Raineri*, 670 F.2d at 715.

[2]Wisconsin defines the offense of prostitution to include intentionally masturbating a person for any thing of value. Wis. Stat. Ann. § 944.30(4) (1982); *City of Madison* v. *Schultz*, 98 Wis. 2d 188, 197, 295

favors to the bar's customers. Prostitutes either put a share of their receipts into a box in the ladies' dressing room or gave it to the bartender. Above the bar were about 20 rooms with beds used for prostitution. The rooms were supplied with sheets, pillowcases, and electricity. *United States* v. *Raineri*, 670 F.2d at 716.

After Gasbarri once removed prostitution-related booths from the bar, petitioner instructed her to put them back and let the girls mingle with the customers or the Showbar would not survive. Throughout the period petitioner managed the Showbar, he and Gasbarri collected, and petitioner usually retained, the proceeds from the prostitution. In addition, petitioner prepared Showbar checks for Gasbarri's signature, recorded information on check stubs and deposit slips, helped her with payroll problems, participated in hiring and firing employees, recruited a bartender, chose a caretaker to run the enterprise during his trip with Gasbarri to a judicial seminar in Reno,[3] worked with Gasbarri whenever problems arose, dealt with the bar's accountant regularly, and counted the bar and prostitution proceeds. At petitioner's request, various dummy officers signed liquor license forms. In March 1979, petitioner told agents of the Wisconsin Alcohol and Tobacco Enforcement Division, who were conducting a routine inspection of the Showbar, that they would not get very far with any prosecution in the county, apparently because of petitioner's status as a Circuit Judge. *United States* v. *Raineri*, 670 F.2d at 716.

As part of its proof of the Travel Act violations, the government showed that a payroll check drawn August 12, 1978, on the Showbar's Michigan bank account and signed

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N.W.2d 798 (Ct. App. 1980). Testimony at trial evidenced such conduct both before and after the statute's effective date of June 1, 1978. See *United States* v. *Raineri*, 670 F.2d at 716 n.10.

[3]On January 1, 1978, petitioner had become a Circuit Judge for Iron County, Wisconsin, within which the Showbar was located.

by Gasbarri was given in Hurley to a Showbar dancer and prostitute as compensation for her nude dancing, and that it crossed the state line in the process of collection. *United States* v. *Raineri*, 670 F.2d at 717. A September 12, 1978, check drawn on the same Michigan bank was used to pay the Lake Superior Power Company, a Wisconsin business, for power at the Showbar.[4] Petitioner had prepared this check for Gasbarri's signature, and the check crossed state lines as part of the regular clearance process. *Ibid.* Sheets and pillowcases were delivered from Hibbing, Minnesota, to the Showbar on October 2, 1978, and two prostitutes testified that they found sheets and pillowcases on the beds where they worked in the rooms above the bar. *Ibid.*

2. The court of appeals rejected all of the numerous issues petitioner raised on his direct appeal from his conviction. In particular, the court held that petitioner was not denied the effective assistance of counsel when his lawyer was unable to qualify Gasbarri's medical records for admission as an exhibit. *United States* v. *Raineri*, 670 F.2d at 710, 711-712. The court also rejected petitioner's claim that the evidence supporting the Travel Act charges was insufficient; it found that (1) petitioner reasonably foresaw the interstate travel or use of facilities in interstate commerce (*id.* at 716-717 n.12); (2) the acts were linked with petitioner (*id.* at 716-717); and (3) the interstate travel or use was significantly related to the illegal prostitution operation (*id.*

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[4]Electricity was used to light the barroom and the upstairs rooms, to chill the champagne, and to provide musical accompaniment for the dancer/prostitutes. *United States* v. *Raineri*, 670 F.2d at 717.

at 717-718).[5] This Court declined to grant certiorari. 459 U.S. 1035 (1982).[6]

3. Petitioner filed a motion under 28 U.S.C. 2255 attacking his conviction on seven grounds: (1) ineffective assistance of counsel; (2) conflicting and misleading jury instructions; (3) erroneous findings of fact made by the district court; (4) admission of testimony regarding business records that were not produced; (5) denial of an effective right to confront a witness resulting from the district court's ruling that Gasbarri's medical records were privileged; (6) error resulting from the prosecution's having proceeded on two theories of liability; and (7) selective prosecution (Pet. App. A1-A2). The district court held that petitioner had raised the ineffective assistance of counsel and erroneous fact

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[5]The court of appeals also upheld the district court's refusal to transfer venue of the trial (see *United States* v. *Raineri*, 521 F. Supp. 30, 32, 33 (W.D. Wis. 1980)). In addition, the court of appeals rejected petitioner's claims that the jury selection plan under which his jury was selected did not comply with the Jury Selection and Service Act of 1968, 28 U.S.C. 1861-1869; that he was denied a speedy trial under the Speedy Trial Act of 1974, 18 U.S.C. 3161-3174; that Counts IV and V were improperly joined for trial with Counts I through III and that the district court abused its discretion in failing to sever them; that the trial court had abused its discretion when it refused to interrupt trial to allow defense counsel to challenge whether Gasbarri's medical records were privileged because counsel had failed to do so prior to trial; that the prosecutor had no standing to move to quash a defense subpoena to recall Gasbarri as a defense witness and the district court's grant of the prosecution's motion violated petitioner's rights to confront the witnesses against him or to call witnesses in his own defense; that petitioner's statements to the grand jury were not material to its investigation; and that there was insufficient evidence that petitioner knew that Patricia Colossaco, the person he arranged to have threatened, would be a grand jury witness. *United States* v. *Raineri*, 670 F.2d at 705-719.

[6]In his petition, petitioner challenged only the court of appeals' disposition of his speedy trial, transfer of venue, and jury composition issues. See Pet. at i, cert. denied, 459 U.S. 1035 (1982).

finding claims on direct appeal and thus was estopped from litigating them again on collateral attack (*id.* at A2). The district court also concluded that the other contentions did not rise to the level required for relief under 28 U.S.C. 2255 (Pet. App. A2).

On appeal, petitioner regrouped his allegations to state three claims: (1) there was a fatal variance between the indictment and the proof at trial; (2) he was denied the effective assistance of trial counsel; and (3) there were fundamental errors in the jury instructions (Pet. App. A2). Petitioner also claimed that none of these issues had been resolved in his direct appeal (*ibid.*).

The court of appeals disagreed. The court concluded that petitioner's first argument was nothing more than an attack on the sufficiency of the evidence, a claim it had already rejected in *United States* v. *Raineri*, 670 F.2d at 715-718. Similarly, the court stated that the ineffective assistance of counsel claim had been addressed and rejected on direct appeal (*id.* at 711-712). Pet. App. A3. Finally, the court of appeals decided that, even if petitioner were correct in his assertion (*id.* at A2) that he had not raised his claims on direct appeal, he had waived those claims absent a showing of cause and prejudice as required by *Norris* v. *United States*, 687 F.2d 899, 903-904 (7th Cir. 1982). Accordingly, the court of appeals concluded that it was not required to consider petitioner's claims (Pet. App. A3).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

Petitioner does not attempt to explain why the court of appeals supposedly erred in refusing to reconsider issues it had already resolved on direct appeal and in refusing to

consider issues that petitioner had effectively waived by not raising them at the appropriate time and failing to make any showing of cause and prejudice for that waiver. Instead, petitioner merely reiterates the merits of some of the arguments he raised below. It is clear, however, that the court of appeals correctly disposed of petitioner's appeal on procedural grounds.

Two of the issues that petitioner asks this Court to review — the necessity under the Travel Act for proof of knowledge of interstate travel or use of a facility in interstate commerce and the sufficiency of the Travel Act evidence —were raised and rejected in petitioner's direct appeal. Moreover, neither issue was included in his petition for a writ of certiorari from the judgment affirming his conviction. See note 6, *supra*. Accordingly, these claims are not the proper subject of a motion to vacate sentence under 28 U.S.C. 2255. See, *e.g.*, *Norris* v. *United States*, 687 F.2d 899, 900 (7th Cir. 1982); *United States* v. *Shabazz*, 657 F.2d 189, 190 (8th Cir. 1981); *Chin* v. *United States*, 622 F.2d 1090, 1092 (2d Cir. 1980), cert. denied, 450 U.S. 923 (1981).

Similarly, there is no indication that petitioner raised the remaining two claims he presents to this Court — the sufficiency of the indictment and the allegedly erroneous jury instructions — in district court,[7] and he has utterly failed to show that his Section 2255 motion satisfied this Court's requirements under *United States* v. *Frady*, 456 U.S. 152 (1982). Under *Frady*, "to obtain collateral relief based on trial errors to which no contemporaneous objection was made, a convicted defendant must show both (1) 'cause' excusing his double procedural default, and (2) 'actual prejudice' resulting from the errors of which he complains" (456

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[7]Despite petitioner's unsupported assertion (Pet. 12) that he challenged the sufficiency of the indictment in his direct appeal, we have discovered nothing in his appellate brief on the direct appeal to support the claim.

U.S. at 167-168).[8] Thus, this case does not merit further consideration by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

GLORIA C. PHARES
Attorney

JANUARY 1985

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[8]Petitioner's reliance on *Morris* v. *United States*, 503 F.2d 457, 458 (5th Cir. 1974), and *Brown* v. *United States*, 468 F.2d 897, 898 (5th Cir. 1972), to support his contention that this Court should consider his claims is misplaced. Both cases were decided before *Frady*, and they no longer offer petitioner any assistance.

DOJ-1985-01